United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

DATE: July 18, 1997

CASE NO.: 95 INA 459

In the Matter of:

INTER-CONTINENTAL HOTELS GROUP,
Employer,

on behalf of

BRIAN L. POPE,
Alien

Appearance: J. J. O'Brien, Esq. of Washington, D. C.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that Inter-Continental Hotels Corp., (Employer), filed on behalf of Brian Pope (Alien), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On December 27, 1993, the Employer applied for labor certification to permit the Alien to fill the position of "Director of Rooms." AF 79. The job requirements were a Bachelor's Degree or equivalent in Hotel & Restaurant management and two years of experience in the job offered or five years in hotel management. Other special requirements included two years of experience in the following: (1) as manager of major department or division of a large scale international luxury resort hotel, including maintaining good employee relations, selection and training of new managers; (2) in international luxury hotel budgeting, forecasting and financial and strategic planning; (3) in management with Rooms Division operations of large scale luxury hotel; (4) as a member of executive Committee of large-scale international hotel; (5) with large-scale international hotel company with interactions with corporate staff; and (6) with hotel profit/loss analysis for a major hotel department. AF 79.

Notice of Findings. On June 6, 1994, the CO's Notice of Findings (NOF)advised that certification would be denied on grounds of a lack of good faith recruitment and the rejection of a U. S. applicant for other than lawful job-related reasons. AF 59. The CO found, moreover, that the Alien did not meet the Employer's educational requirements for the position. As evidence of his qualifications, the Alien had submitted a letter from Carl Walther, who is an International Educational Consultant. Dr. Walther credited the Alien with one-half of a year of lower division undergraduate university credits and twelve years and three months of "professional work experience," which he said was equal to the formal education sought by the Employer. The CO questioned this expert's assumption that the initial part of the Alien's "professional work experience" included more than three years of clerical jobs which were not even in the hotel industry.

Citing 20 CFR § 656.21(b)(5), the CO also questioned whether the Alien had the experience requirements listed in Employer's application before the Employer hired him, noting in addition that the special skills that the Employer required in this job appeared tailored to the Alien's background. Finally, the CO found that the Employer rejected one U.S. worker for other than lawful reasons.

The CO directed the Employer to add to the record the evidence that follows as corrective action: (1) evidence supporting the specific lawful job-related reasons for Employer's rejection of the U. S. applicant Ulrich at the time he initially was referred and considered; (2) evidence that the position was

clearly open to Mr. Uhlrich at the time he initially was referred and considered for the job; and (3) evidence that the Employer engaged in timely good faith recruitment of Mr. Uhlrich at the time he initially was referred and considered for the job. AF 32.

Rebuttal. On July 7, 1994, Employer filed its rebuttal, contending that Mr. Uhlrich indicated that he was not interested in the position when it contacted him a timely fashion. The Employer enclosed an affidavit from Ulrich attesting to this. AF 48.

Addressing the Alien's qualifications, Employer said that he had the equivalent of a Bachelor's Degree of Business Administration in Hotel and Restaurant Management and at least five years of hotel management experience. Employer contended that it did not tailor the required special skills to the qualifications of Mr. Pope. AF 51. In support of the degree equivalency of the Alien's work experience, on which it rested these contentions, the Employer urged the CO to rely on Dr. Walther's evaluation.

In discussing the Alien's hotel industry experience, the Employer said he had at least eight years of experience in hotel management from 1982 to 1990, relying on Alien's ETA 750 B and on a document submitted on Employer's letterhead and entitled "Employment History of Brian L. Pope in Professional and Managerial Positions in the Field of International Hotel and Hospitality Management." AF 119. Employer then summarized the duties involved in every position held by the Alien from 1982 to present, asserting that each of them was managerial in nature. Finally, Employer again argued that it did not tailor its special requirements to the Alien because the Alien already had more experience than it required before the Employer hired him.

Final Determination. The CO denied certification in the Final Determination (FD) issued on September 12, 1994. AF 28. The CO found the Employer to be in violation of 20 CFR §§ 656.21 (b)(2), (b)(2)(ii), (b)(5), (b)(6), (j)(1), (b)(2), and (b)(5); 656.20(c)(8); and 656.24(b)(2)(ii).

Except for the affidavit of Mr. Ulrich, the CO found that the preponderance of the rebuttal was in the form of a letter by Employer's attorney, commenting that "where evidence is obtainable from other sources, absent extraordinary circumstances, an employer's attorney...should not act as a witness." **Mark Austin,** 91 INA 158 (March 26, 1992). Finding no documentation of any extraordinary circumstances in this case, the CO concluded that the remaining issues raised in the NOF had not been rebutted by the Employer.

The CO rejected the Employer's rebuttal claim that its special job requirements were consistent with the hotel industry standard on grounds that they were unsubstantiated in the record.

The CO said that the only evidence of the Alien's work experience was (1) the ETA 750 Part B and (2) the Alien's statement of his work history, both of which were filed by the Employer and by the Alien as interested parties; and (3) the history on which Dr. Walther relied in his opinion. As to the questions that the CO raised regarding Dr. Walther's evaluation and his reliance on work involving low skills as professional work experience, the CO observed that the Employer's rebuttal consisted of no more than the argumentative assertions of Employer's attorney, without the corroboration of substantiating documentation in support of the acceptance of Dr. Walther's evaluation.

Appeal. On October 17, 1994, Employer moved that the CO reconsider the denial of certification. AF 22. After review, the CO said that "USDOL will concede that there was timely contact of the U. S. worker, and that the U. S. worker declared no further interest in the job offer." The CO found, however, that the Employer had failed to rebut all of the findings of the NOF, and so reaffirmed the Final Determination. On December 2, 1994, the Employer appealed to the Board, requesting a review of the CO's findings. AF 01.

DISCUSSION

In its argument in support of review the Employer said it had performed all of the corrective actions directed by the CO. We cannot consider the new evidentiary material submitted by Employer with the request for review, as the Board is limited to the evidence already of record. It follows that our review will be based on the record upon which labor certification was denied, the Employer's request for review, and any statement of position or legal briefs. 20 CFR § 656.27(c).

Employer further argued that the NOF was confusing, saying it was extremely difficult to rebut for that reason and asserting that the CO erred in failing to request additional documentation of the Alien's qualifications by way of Corrective Action in the NOF. In this the Employer relied on the holding that the NOF must be adequate to give Employer an opportunity to rebut or cure any defects noted. **Downey Orthopedic Medical Group,** 87 INA 674 (Mar. 16, 1988)(en banc). The Employer's rebuttal gives clear indication that the NOF was adequate in this case. The Employer was not in doubt and it fully addressed the issue of what it called the CO's "oblique assertions that the alien, Brian Pope, does not qualify for the position of Director of Rooms." There was no "oblique assertion" in this case. The CO explicitly said that the Alien was not qualified by the education and experience stated in his application. The Employer's rebuttal, moreover, clearly showed that it was aware that the Alien's qualifications and education were questioned, and that their adequacy needed to be supported with persuasive evidence. AF 67.

An Employer's treatment of an issue in its rebuttal may be one indication that the NOF provided adequate documentation. **Anderson-Mraz Design,** 90 INA 142 (May 30, 1991). In this case the Employer addressed all the issues raised in the NOF. In contrast to **Potomac Foods, Inc.,** 93 INA 309(Jul. 26, 1991), an order of remand was found appropriate where the CO had failed to clarify the evidence that was needed to support that employer's argument of business necessity, despite the repeated requests by the employer for clarification. In the instant case, Employer never found it necessary to request clarification, nor does the record contain any indication that clarification was sought by the Employer until after certification was denied in the Final Determination.

Moreover, the Employer mistakenly attempted to rebut the NOF by relying solely upon the arguments and assertions made by its attorney, as the CO correctly observed in the FD. Even though it was advised that the CO found the evaluation rendered by Dr. Walther was not sufficient to prove that the Alien's education satisfied the requirements listed for the position at issue, the Employer continued to rely upon the opinion by Dr. Walther, and it failed to produce any added documentation in support of its position on this issue. The evaluation by Dr. Walther predicated his conclusions on the assumptions that follow:

> Alien's accounts of professional work experience are verified for the time period 1980-1988, and it is assumed that the Immigration Office will obtain verification of alien's education and professional work experience during the period 1977-1980 and alien's professional work experience during the most recent period 1988 to present.

The documentation that Dr. Walther assumed would be provided and on which he predicated his evaluation, was never submitted. Indeed, Employer failed to submit to the CO any verification of the Alien's employment, even though the NOF gave it notice that the CO questioned the nature and adequacy of the Alien's work history. In its lawyer's argument the Employer offered no more than a bare assertion that the Alien's experience was sufficient to qualify him for the job.

While a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is insufficient to carry an Employer's burden of proof. **Gencorp**, 87 INA 659 (Jan. 13, 1988)(en banc). The only information on the Alien's background that the Employer and Alien provided was found in the application for labor certification. This information consists of the Alien's ETA-750 Part B, and the "Employment History" that the Alien also completed. The ETA-750 was not completely filled out, however, as the Alien's answers did not provide all of the detailed information that the form requested. Primarily, the Alien failed to list either the months

he attended the educational institutions he alleged or degrees he acquired, and he failed to list the months when his employment started and ended. Even though the Alien's responses to these detailed questions would have been self-serving declarations, the documents as filled out by him are not sufficient to establish that he meets the Employer's stated educational and experience requirements for this position.

Moreover, while the Employer concedes that the Alien does not have the requisite degree, it argues that Dr. Walther's evaluation is sufficient to prove that the on-the-job experience that the Alien purports to have enjoyed during his career is the equivalent of the academic degree Employer requires by virtue of the combination of that work with the educational courses he has taken. Relying upon the ETA 750 B, and "Employment History" as completed by the Alien, the Employer contends that the Alien has five years of experience in Hotel Management. As noted, however, in those documents the Alien did not list the months when the jobs began and ended, details that are critical in computing the actual time that he spent any given position before the CO can evaluate the nature and content of the jobs the Alien listed.

The record in this case is similar to that of **Databyte Technology, Inc.,** 93 INA 263 (Jun. 28, 1994), in which labor certification was properly denied where the job offered required two years experience with supervisory and managerial duties. That employer's documentation stated only that the Alien worked as an Engineer from "1984 to May 1986." In spite of the request in the NOF for documentation in the instant case, the Alien and the Employer failed to produce verification from past employers to establish that this Alien actually worked in Hotel Management for five years. The Employer's attempt to explain the duties involved in the Alien's former jobs in an effort to establish the requisite experience does not constitute documentation, as all of those assertions were made by its attorney without verification that they were factual. **Michael S. Sussman**, 93 INA 200(Aug. 17, 1993); **LA Dye & Print Works, Inc.,** 92 INA 201(Apr. 14, 1993).

It is well-established that an employer must establish that the alien possesses the stated minimum requirements for the job at issue. **Charley Brown's,** 90 INA 345 (Sept. 17, 1991). Where the alien does not meet the employer's stated job requirements, certification is properly denied under 20 CFR § 656.21(b)(6). **Marston & Marston, Inc.,** 90 INA 373(Jan. 7, 1992). The only evidence addressing the issue of whether this Alien meets the job requirements stated by the Employer consists of Form ETA 750-B, the Alien's attached "Employment History," and the evaluation by Dr. Walther. All three are based upon the bare assertions of the Alien without any supporting documentation. This is insufficient evidence to demonstrate that the Alien had satisfied Employer's actual minimum requirements. **MITCO,** 90 INA 295(Sept. 11, 1991). By the same reasoning, the Employer's unsupported statement that

the Alien meets its minimum requirements does not constitute adequate documentation that the Alien meets those requirements. **Wings Wildlife Production, Inc.,** 90 INA 069(Apr. 23, 1991). Moreover, in the context of the Alien's job qualifications, it is again observed that the Employer was requested to clarify the Alien's background, and it failed to do so. This, in itself, is ground to deny certification. **Adler K. Chia,** 93 INA 153(Jan. 31, 1995).

The foregoing considerations are sufficient to support the finding that labor certification was properly denied by the CO, and the remaining issues need not be addressed. For these reasons we conclude that the Certifying Officer properly denied certification under all of the facts of this case.[2] Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

Judge Holmes, dissenting.

I respectfully dissent. Contrary to the CO's Final Determination, Employer in my opinion carried his burden of demonstrating: (1) that it lawfully rejected the U. S. applicant in question, Mr. Ulrich; (2) that the job opportunity was clearly open to the U. S. applicant; and (3) that it had a timely good faith recruitment of the U. S. worker.

Employer timely contacted Mr. Ulhric, who declined the offer since he was no longer interested. No contradictory evidence was presented. The majority bases their opinion primarily on the fact that rebuttal was submitted by Employer's attorney, and that the documentation of Dr. Walther was not supported by confirming documentation. I find these reasons insufficient for affirmance

[2]In closing, the dissent has observed, "However, absent a clear case where the job opportunity can be filled by a willing, qualified and able U.S. worker, I would not deny certification on questionable technicalitiies." As this statement on its face suggests a reversal of the burden of proof in cases under the Act and regulations, it should be emphasized that this does not express the view of the majority of this panel.

of denial of labor certification. Specifically, I take exception to denigrating Dr. Walther's opinion since the Alien did not list the months when various jobs began and ended, and therefore the five years of Hotel Management was not proven. I find a recitation of the exact months of employment unnecessary since Alien had well in excess of the five year requirement, i.e., a minimum of approximately eight years more likely approximately 13 years qualifying experience before employment with this Employer. The majority opines that more documentation was necessary, but the CO did not ask for any such documentation; he merely found Employer's explanation unconvincing. Finally, the fact that Employer's attorney submitted the rebuttal evidence is standing alone not grounds for denial of certification. Counsel submitted a 10 page document in the nature of a legal brief that presented legal arguments as well as detailed knowledge of the facts and circumstances of this case, which could only have been garnered by frequent contact with Employer.

In passing the 1990 amendments to the Act, Congress stated: "The Report of the President's Council of economic Advisors (February 1990) supports the proposition that immigration may play a key role in meeting domestic labor market demands:

Immigration policies can also contribute to the smooth operation of the U.S. labor market in the 1990's. While continuing the humanitarian principles that have shaped immigration policies in the past, the Federal government can encourage the immigration of workers with skills important to the economy, both by increasing the number of visas for workers with a job in hand and by increasing quota levels for potential immigrants with higher levels of basic and specific skills. This approach will strengthen the prospests for successful assimilation of immigrants into U.S. society and increase the economic gains from immigration for the population as a whole. (P.166)." (P.L. 101-649; U.S. Code and Ad News, 6721)

The job in question, while not in the high-tech area, does require a high level of sophistication and experience, in a business where high standards are required. It would appear to meet the purposes of the 1990 amendments as quoted above. There appears little question that Employer has a preference for alien to fill the job position. However, absent a clear case where the job opportunity can be filled by a willing, qualified and able U.S. worker, I would not deny certification on questionable technicalitiies. I would remand for granting of certification.

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John C. Holmes, Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO.: 95 INA 459

INTER-CONTINENTAL HOTELS GROUP, Employer,
BRIAN L. POPE,Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 30, 1997.